Public Bank Bhd v Paramjit Singh Gill

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2783–11 OF 2011

B

ABDUL AZIZ AB RAHIM, MAH WENG KWAI AND DAVID WONG JJCA

8 JULY 2014

C

Banking — Banks and banking business — Guarantee — Demand guarantee — Demand for payment — Letter of demand a prerequisite — Deeming provision for service of letter of demand — Whether letter of demand properly served — Whether claim time barred

D

Civil Procedure — Concession — Agreed fact — Whether agreed fact can be reopened once conceded to — Parties prohibited from approbating and reprobating

E

Diam Ubi Sdn Bhd ('Diam Ubi') was granted a banking facility in the form of an overdraft in the sum of RM3m. The respondent executed a letter of guarantee to guarantee repayment of the facility. The facility was terminated by the appellant in 1985 and demands were made for the payment of the outstanding sums. A letter of demand dated 30 May 1986 ('1986 Demand') was issued to the respondent. Premised on the 1986 Demand, the appellant initiated a legal suit against the respondent ('the 86 Suit') on 2 July 1986. The defence of the respondent in the 86 Suit was that he never received the 1986 Demand and hence pleaded that there was no demand as required by the letter of guarantee to effect any liability to pay. The 86 Suit was set down for trial on 4 May 1998. The appellant however conceded that there was no proper service of the 1986 Demand and thus withdrew the 86 Suit with liberty to file afresh. Subsequently, the appellant issued another letter of demand on 11 June 1998 ('1998 Demand') and premised on that demand the appellant took out the present suit against the respondent to recover the outstanding sum. The respondent raised the defence of limitation on the ground that the present suit was time barred as the cause of action had arisen well back in 1986 when the appellant issued the 1986 Demand. The respondent contended that in view of the affidavit evidence of the appellant averring that there has been a posting of the 1986 Demand, the deeming provision in cl 8 applied and hence he was deemed served with the letter of demand in 1986. The learned judge held that the real demand and the earliest time the plaintiff could have brought the action was 30 May 1986 and hence the present suit was time barred. The appellant appealed against this decision.

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Held, allowing the appeal with costs of RM20,000:

(1) When there is a 'demand' guarantee, as in this case, there must be a 'demand' made on the guarantor before his or her obligation to pay arises. The guarantor, ie the respondent, was only liable to pay when he was requested by the appellant in the form of a letter of demand (see para 12).

(2) Clause 8 was a provision drafted for the benefit of the appellant and it was to alleviate the necessity on the part of the appellant to prove that the respondent was physically served with the letter of demand. Hence, the deeming of the fact of a proper service of the letter of demand when there is a challenge on the proper service of the same (see para 16).

(3) In the 86 Suit, the parties had agreed as a matter of evidence that there was in fact no service of the 1986 Demand. When there is a challenge to a factual issue by one litigant and conceded by the other litigant, that factual issue is settled pure and simple. The appellant chose not to invoke that deeming provision in the 86 Suit which simply meant that they conceded that there was no service (see paras 19–20).

(4) By availing himself the defence of non-receipt and invalidity of the 1986 Demand, the respondent in fact was taking a factual position which was conceded by the appellant and once concession was made, there could not be any reopening of the agreed fact. The respondent was simply approbating and reprobating in his conduct. Hence, the present suit was not time barred (see paras 21–22 & 27).

[Bahasa Malaysia summary

Diam Ubi Sdn Bhd ('Diam Ubi') diberi kemudahan kewangan dalam bentuk overdraf dalam jumlah RM3 juta. Respondent melaksanakan surat jaminan untuk menjamin bayaran balik kemudahan tersebut. Kemudahan ditamatkan oleh perayu pada tahun 1985 dan tuntutan-tuntutan dibuat untuk bayaran terhadap jumlah yang belum diselesaikan. Surat tuntutan bertarikh 30 Mei 1986 ('Tuntutan 1986') dikeluarkan kepada responden. Berdasarkan atas Tuntutan 1986, perayu memulakan tindakan undang-undang terhadap responden ('Guaman 86') pada 2 Julai 1986. Pembelaan responden dalam Guaman 86 adalah bahawa dia tidak pernah menerima Tuntutan 1986 dan maka memplid bahawa tidak terdapat tuntutan seperti yang dikehendaki oleh surat jaminan untuk membangkitkan apa-apa liabiliti untuk membayarnya. Tindakan 86 ditetapkan untuk perbicaraan pada 4 Mei 1998. Perayu walau bagaimanapun bersetuju bahawa tidak terdapat serahan Tuntutan 1986 yang betul dan oleh itu menarik balik Guaman 86 dengan kebebasan untuk memfailkan tindakan baru. Perayu kemudiannya mengeluarkan surat tuntutan yang lain pada 11 Jun 1998 ('tuntutan 1998') dan berdasarkan atas tuntutan tersebut perayu membangkitkan tindakan terhadap responden untuk mendapatkan balik jumlah yang belum diselesaikan. Responden membangkitkan pembelaan had masa atas alasan bahawa tindakan ini dihalang

oleh had masa kerana kausa tindakan telah berbangkit semenjak tahun 1986 semasa perayu mengeluarkan Tuntutan 1986. Responden berhujah bahawa mengambil kira keterangan afidavit perayu dengan berhujah bahawa terdapat pemberitahuan mengenai Tuntutan 1986, peruntukan dalam klausa 8 diguna pakai dan maka dia dianggap diserahkan dengan surat tuntutan pada tahun 1986. Hakim yang bijaksana juga memutuskan bahawa tuntutan sebenar dan masa yang paling awal plaintif boleh membawa tindakan adalah 30 Mei 1986 dan maka tindakan ini dihalang masa. Perayu merayu terhadap keputusan ini.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM20,000:

(1) Apabila terdapat jaminan 'demand' seperti dalam kes ini, mesti terdapat 'demand' dibuat ke atas penjamin sebelum tanggungjawabnya untuk membayar berbangkit. Penjamin, iaitu responden, hanya bertanggungjawab untuk membayar apabila dia diminta oleh perayu dalam bentuk surat tuntutan (lihat perenggan 12).

(2) Klausa 8 adalah peruntukan yang didrafkan untuk faedah perayu dan ia adalah untuk mengurangkan keperluan bagi pihak perayu untuk membuktikan bahawa responden telah secara fizikal diserahkan kepadanya surat tuntutan. Dengan itu membenarkan fakta serahan betul surat tuntutan itu, apabila terdapat cabaran atas serahan betul terhadapnya (lihat perenggan 16).

(3) Dalam Guaman 86, pihak-pihak mengakui sebagai keterangan bahawa sebenarnya tidak terdapat serahan Tuntutan 1986 tersebut. Apabila terdapat cabaran kepada isu fakta oleh seorang litigan dan diakui oleh seorang lagi litigan, fakta isu tersebut diselesaikan secara bersih dan ringkas. Perayu memilih untuk tidak membangkitkan peruntukan dalam tindakan 1986 yang hanya bermaksud bahawa mereka mengakui bahawa tidak terdapat serahan (lihat perenggan 19–20).

(4) Dengan menggunakan pembelaan ketidakterimaan dan ketaksahan Tuntutan 1986, responden sebenarnya mengambil kedudukan fakta yang diakui oleh perayu dan apabila kompromi dibuat, tidak dapat pembukaan semula apa-apa fakta yang dipersetujui. Responden hanya menerima dan menolak dalam tingkah lakunya. Maka, tindakan ini tidak dihalang masa (lihat perenggan 21–22 & 27).]

Notes

For cases on guarantee, see 1(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2551–2552.

Cases referred to

Nik Che Kok @ Nik Soo Kok v Public Bank Bhd [2001] 2 MLJ 328; [2001] 2 CLJ 157, CA (folld)

A *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd* [2004] 6 MLJ 1, HC (refd)

Appeal from: Suit No D2-22–3052 of 1998 (High Court, Kuala Lumpur)

B *Goh Meng Yew (Nur Azwa bt Fadzil with him) (Iza Ng Yeoh & Kit) for the appellant.*
T Gunaseelan (Balwant Singh Sidhu with him) (Gill & Tang) for the respondent.

David Wong JCA (delivering judgment of the court):

C

INTRODUCTION

[1] This is an appeal against the decision of the High Court in which the learned judge dismissed the appellant's application for summary judgment
D premised on a guarantee agreement given by the respondent in respect of a loan granted by the appellant to one Diam Ubi Sdn Bhd ('Diam Ubi').

[2] We heard the appeal and after due consideration of the respective submissions of counsel, we allowed the appeal and now give our reasons.
E

BACKGROUND FACTS

[3] Diam Ubi was granted a banking facility in the form of an overdraft in the sum of RM3,000,000. As part of the securities, the appellant required
F guarantees from the directors of Diam Ubi. The respondent being one of the directors executed a letter of guarantee dated 17 December 1979 ('the letter of guarantee').

G **[4]** The overdraft facility was terminated by the appellant sometime in 1985 whereupon demands were made for the payment of the outstanding sum from Diam Ubi and the respondent. The subject matter of dispute in this appeal is the letter of demand dated 30 May 1986 ('1986 Demand') issued to the respondent. Premised on the 1986 Demand, the appellant initiated a legal
H suit against the respondent, Diam Ubi, the chargor and three other directors in Suit No C23–1931 of 1986 ('86 Suit') on or about 2 July 1986.

[5] The respondent is the fifth defendant in the 86 Suit. The appellant took out an application for summary judgment against all the defendants there but
I was not successful with the court ordering the same for trial.

[6] The defence of the respondent in the 86 Suit was that he never received the 1986 Demand and hence pleaded that there was no demand as required by the letter of guarantee to effect any liability to pay. In short the cause of action

under the letter of guarantee has not 'kicked in' so to speak. He also pleaded that the demand was ineffective as the same had claimed for an amount in excess of the guarantee limit.

[7] The 86 Suit was set down for trial on 4 May 1998 and on that day the same was withdrawn with liberty to file afresh. The circumstances in which the 86 Suit was withdrawn can be seen from the notes of proceedings of the court and they are as follows:

> 4/5/98
>
> Coram: YA Dato Ariffin Hj Jaka, CES for P1. Teh & Justin Voon for the 2nd and 3rd Defendants, 1st–5th, 3rd Parties. MS Murthy for 5th & 6th Defendants (Sarjeet Sidhu with him)
>
> In chambers Judge asked Teh to withdraw SIC dated 24/4/98 (E.106 & 109) as he was of the opinion that 2nd & 3rd Defendants can still raise a preliminary issue on whether there was proper demand at the trial. At this juncture, the Judge enquired whether P1 wished to withdraw action with liberty to file afresh.
>
> In open Court, Judge asked whether P1 wishes to withdraw action, if the P1 proceeds with the claim & the P1 cannot prove its demand against the 2nd, 3rd & 5th Defendants, the P1 may be prevented from proceeding with a new action on the ground of res judicata.
>
> CES asked for an adjournment to 10.30 am to obtain instruction from client. Court allowed further adjournment pending further instruction from client. Instructed to withdraw action (confirmed with Liew Kee Lim & YCK).
>
> Court allowed action as against D2, D3 & D5 be withdrawn with liberty.

[8] In the subsequent month of the withdrawal of the 86 Suit, the appellant issued another letter of demand on 11 June 1998 ('1998 demand') and premised on that demand the appellant took out this suit ('98 Suit') against the respondent under the letter of guarantee to recover the outstanding sum due from Diam Ubi.

[9] We should note here that there was no delay on the part of the appellant in prosecuting its claim under the letter of guarantee despite this suit being launched in 1998. The delay was due to the fact that the trial of the 86 Suit was only set down for trial in 1998.

[10] To defend this suit, the respondent raised the defence of limitation on the ground that suit 98 is time barred as the cause of action had arisen well back in 1986 when the appellant issued the 1986 Demand.

THE HIGH COURT DECISION

[11] The learned judge after a detailed and incisive discussion of the relevant authorities from various jurisdictions concluded as follows:

> The case authorities in Malaysia have defined accrual of cause of action in a guarantee claim in terms of the time a demand is made on the guarantor where the guarantee by its terms is a guarantee payable upon demand. The demand has to be a real demand, and it is a condition precedent to liability (*Mok Hin Wah v UMBC*). For the purpose of determining when time shall begin to run, it shall be calculated from the earliest time at which the creditor could have brought an action (*Nik Che Kok; Joseph Thambirajah*). To be a real demand or an effective demand, it is not necessary for the demand to state with precision the amount being claimed, since the function of the demand is essentially for the purpose of bringing home to the debtor that the creditor is demanding its money (*Nik Che Kok*; *O'Day v Commercial Bank of Australia*).
>
> Hence based on the facts of this present case, where there exist multiple demands and a previous suit against the guarantor which was withdrawn and struck out with liberty, the question to ask is when was the real demand made, and correspondingly when was the earliest time the creditor could have brought the action against the guarantor?
>
> In my considered view, and based on the law, the real demand and the earliest time the plaintiff could have brought the action against the second defendant was 30 May 1986. The present action being filed in 1996, it is therefore time barred under s 6(1)(a) of the Limitation Act 1953. Limitation had set in on 30 May 1992.
>
> True enough, the plaintiff was allowed to withdraw with liberty, but this decision was deliberate and conscious choice of the plaintiff. It is not right to pin the blame on the second defendant and to suggest he is using the Limitation Act as an engine of fraud, or that he is guilty of approbating and reprobating. On the evidence, the second defendant availed himself of a legitimate defence of non-receipt and invalidity of the letter of demand of 30 May 1986. The letter of guarantee, by cl 8, defines what would be an effective demand. There is no doubt the letter was posted, otherwise why would the plaintiff argue it could not provide proof of posting, or even proceed to file the 1986 action? It is no answer to now argue the letter of demand is invalid for demanding an amount in excess of the guarantee limit of RM3m, since such a mistake is not necessary fatal. A letter of demand need not state with precision the amount being claimed. Although there are a number of High Court decisions to the contrary (*Co-operaive Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283 and *RHB Bank Bhd v Farlim Holding Sdn Bhd & Ors* [2005] 2 MLJ 638), I am bound by precedent to follow *Nik Che Kok* which holds it is not necessary for a letter of demand to state with precision the amount being claimed.

OUR GROUNDS OF DECISION

[12] It is our considered view that the law is quite clear on what triggers the 'cause of action' when there is a 'demand' guarantee as we have in this case and

it is this. There must be a 'demand' made on the guarantor before his or her obligation to pay arises. In simple and plain English, the guarantor in this case the respondent is only liable to pay when he is requested by the appellant in the form of a letter of demand. And whether there was in fact a 'demand' made is purely a question of fact and depends on the particular circumstances of each case.

[13] The letter of guarantee stipulates that the respondent had agreed to pay the appellant to the extent of RM3,000,000 with interest thereon upon receiving a demand for payment of the agreed guaranteed amount.

[14] To recap, the respondent had denied that he ever received the 1986 Demand and hence contended that his liability had not crystallised under the 'on demand guarantee' or was never requested to pay.

[15] In this suit however, the respondent now contends that he has received the 1986 Demand premised on cl 8 of the letter of guarantee which states as follows:

> ... any notice may be served on each of us or on the legal personal representatives of each of us either personally or by sending the same through the post in an envelope addressed to the above-mentioned address or the last known place of address of the person to be served, and a notice so sent shall be deemed to be served on the day that on which it is posted.

[16] With respect, we are unable to agree with such a contention and our reasons are these. Clause 8 is a provision drafted for the benefit of the appellant and it is to alleviate the necessity on the part of the appellant to prove that the respondent was physically served with the letter of demand. Hence the deeming of the fact of a proper service of the letter of demand when there is a challenge on the proper service of the same.

[17] That was what happened in the 86 Suit. The respondent was found wanting as to whether they could prove that there was in fact posting of the letter of demand to kick in the 'deeming provision' when asked by the learned judge in the 86 Suit prior to the commencement of the trial. That was the crux of the 86 Suit. That being so, the appellant took the position that they will concede that there was no proper service of the 1986 Demand as contended by the respondent and obtained an order of withdrawal of the 86 Suit with liberty to file afresh.

[18] The respondent now contends that that concession is of no consequence and in view of the affidavit evidence of the appellant averring that

there has been a posting of the letter of demand, the deeming provision in cl 8 applies and hence he is now deemed served with the letter of demand in 1986. With respect we are not able to agree.

[19] To recap, the respondent's liability to pay does not arise when there is no request to pay by demand. Can there be any demand when in the 86 Suit there was no trial and no determination of the crucial issue of service of the letter of demand. Further, parties have in fact agreed as a matter of evidence that there was in fact no service of the 1986 Demand. We say it is 'a matter of evidence' for the simple reason that when there is a challenge to a factual issue by one litigant and conceded by the other litigant, that factual issue is settled pure and simple.

[20] Learned counsel for the respondent makes much about the averments of the appellant in the 86 Suit that there was in fact posting of the letter of demand. With respect, that was the position they took in the context of the denial of proper service of the letter of demand. Whether that can be proved is another matter. In any event we find that cl 8 is a provision which can be only invoked by the appellant when there is a challenge as to the service of any notice. In this case, the appellant chose not to invoke that deeming provision in the 86 Suit which simply means that they conceded that there was no service.

[21] As for the respondent's change in position as contended by the appellant, we with regret, also cannot agree that the respondent was then 'availing himself of a legitimate defence of non-receipt and invalidity of the letter of demand of 30 May 1986' as held by the learned judge. By availing the defence of non-receipt, the respondent in fact was taking a factual position which as we have said above was conceded by the appellant and once concession was made, there cannot be any reopening of the agreed fact. Not only that it is logical, it is also only just and fair.

[22] It is also our view that the respondent is simply approbating and reprobating in his conduct. This court in the case of *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd* [2004] 6 MLJ 1 has commented on this course of conduct:

> ... [60] it is said that no one should approbate and reprobate (*Lissenden v CAV Bosch Ltd* [1940] AC 412 at pp 417–418; [1940] 1 All ER 425 at p 429 (HL); and *Harrison v Wells* [1967] 1 QB 263 at p 277, [1966] 3 All ER 524 at p 530 (CA)). Flowing from this principle, two propositions may be advanced:
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> (1) a person who has a choice between two courses of conduct may make an election from which he cannot resile;
>
> (2) a person will not be regarded as having made an election unless he has benefitted under it or by his course of conduct which he has first pursued

is inconsistent with his subsequent conduct (*Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112 at pp 119–120, [1950] 2 All ER 549 at p 552; *Smith v Baker* [1873] LR 8 CP 350; Re Morton, *ex p Robertson* [1875] LR 20 Eq 733; and *Evans v Bartlam* [1937] AC 473at p 479, [1937] 2 All ER 646 at p 649).

[23] As the learned judge and counsel had referred to the case of *Nik Che Kok @ Nik Soo Kok v Public Bank Bhd* [2001] 2 MLJ 328; [2001] 2 CLJ 157, we are duty bound to comment on that judgment which we have read with utmost care. The relevant paragraph of that judgment is that quoted by the learned judge in his grounds and for clarity we reproduce the same here:

> The High Court came to the conclusion that looking at all three alleged notices of demand, there were no sufficient evidence to show whether they are actually notices of demand under the letter of guarantee and that these had raised triable issues. Therefore, not a fit and proper case to strike out the respondent's claim. Looking at the facts and circumstances of this case, we are of the view that the liability of the principal debtor as well as that of the guarantor arose from the first notice of demand dated April 2, 1986. For all intents and purposes, it is a notice of demand failing which the respondent could have legally filed a suit against the principal debtor as well as against the guarantors. Conceded that the first notice of demand did not specify the precise amount owing but there is no general rule that such a notice must specifically mention the precise amount owing. We are of the view that a demand is for the purpose of bringing home to the debtor that the creditor is demanding its money (See *O'day v Commercial Bank of Australia* [1993] 50 CLR 200). It is our view that for the purpose of limitation, time began to run from the earliest time at which the creditor could have brought an action. In the present case, the earliest time the respondent could have commenced a suit was soon after filing the notice of demand of April 2, 1986. On the facts of this case, we are of the view that since the suit was filed more than six years after the cause of action accrued, the suit is statute barred by virtue of s 6(1)(a) and the Limitation Act 1953 ... (at pp 1624–1625).

[24] From the above, the crucial part of that paragraph is where it states that the purpose of the demand is to 'bring home to the debtor that the creditor is demanding its money'. That is exactly what we are saying. If the service of the letter of demand is not known to the respondent, it cannot be 'brought home' to the respondent. This was what happened in 1986 and as discussed by us above, we found no demand had been made. We can only assume that in *Nik Che Kok* the first letter of demand had been served on the guarantors there as there was no discussion on it. As we have stated earlier the service of the letter of demand is a factual issue and that issue was settled in the 1986 Suit. Hence we see no difficulty in following the rationale of the court in *Nik Che Kok*.

[25] As for the contention by the appellant that the 1986 Demand was invalid on the ground that the same had demanded more than actually due, we see no merit as the law is now clear in that such excessive claim if any, does not invalidate the letter of demand.

CONCLUSION

[26] Commerce is regulated by contracts entered by the entrepreneurs and when promises of one party are made in consideration of the other party's promises, the party who had honoured its part of the bargain expects that the other party who had benefited to honour those promises. In the case at hand the appellant had extended the banking facility to the respondent's company premised on his guarantee. In other words, a sum of RM3,000,000 had been disbursed by the appellant and utilised by Diam Ubi. The respondent must be expected and required to honour his written words.

[27] For reasons stated above we find that appellant's 98 Suit is not time barred and accordingly we allowed this appeal, set aside the judgment of the High Court and awarded costs in the sum of RM20,000 to the appellant. We also entered judgment for the appellant in terms as set-out in the statement of claim. Finally we order that the deposit be refunded to the appellant.

Appeal allowed with costs of RM20,000.

Reported by Kanesh sundrum